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SUPREME COURT U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

121

No. 121.

BLACK DIAMOND STEAMSHIP CORP.,
Petitioner,

vs.

ROBERT STEWART & SONS, LTD., *et als.*,
Respondents.

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No. 130.

UNITED STATES OF AMERICA,
Petitioner,

vs.

ROBERT STEWART & SONS, LTD., *et als.*,
Respondents.

BRIEF FOR RESPONDENTS.

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BRIEF FOR RESPONDENTS.

Jurisdiction.

The decree of the Court of Appeals for the Second Circuit (R. 28) was entered on March 29, 1948. Petition of Black Diamond Steamship Corp. was filed on June 25, 1948, and the petition of the United States of America was filed on June 28, 1948. Respondents did not oppose certiorari, which was granted on October 11, 1948 (R. 29). Jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

Statement.

The American merchant vessel "Norwalk Victory", owned by the pefitioner, United States of America, and operated under bareboat charter by petitioner, Black Diamond Steamship Corp., of Maryland, as owner *pro hac vice*, in a liner service between New York, Antwerp, Amsterdam and Rotterdam, collided on April 28, 1947, with the British merchant vessel "Merganser" in Belgian territorial waters. As a result of the collision, the "Merganser" sank, one of her crew members was killed, and her cargo on board, valued at nearly $1,000,000, was lost.

Shortly after the collision, an action was commenced in England against the "Norwalk Victory" and her owners to recover $1,000,000 for loss of the "Merganser". Although neither the "Norwalk Victory" nor her owners were within the reach of British processes, a voluntary appearance promptly was entered on behalf of the "Norwalk Victory", and petitioner, Black Diamond Steamship Corp., posted bail in pounds sterling equivalent to $1,000,000 (R. 17).

On October 14, 1947, the owners of cargo lost on the "Merganser" commenced a suit in admiralty against the "Norwalk Victory" and against her owners in the United States District Court for the Eastern District of New York, alleging the "Norwalk Victory" to be solely at fault for the collision, and claiming damages of approximately $1,000,000.[1] This suit was brought in the District of the United States where the vessel was found, as required by the Suits in Admiralty Act, 1920, 46 U. S. C. 742 (R. 17).

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[1] All of the known or asserted cargo claims are consolidated in the one action against the United States and Black Diamond in the District Court, and total damages alleged in the libel, as now amended, are $900,000.

On October 28, 1947, counsel for Black Diamond Steamship Corp., on its behalf as bareboat charterer of the "Norwalk Victory", and on behalf of the United States, as owner, filed a petition in the District Court for exoneration from or limitation of liability (R. 1-10). The petition prayed in substance:

(1) That the Court rule, if the petitioners be found liable, that they be entitled to the benefits of the Belgian law in respect of limitation upon shipowners' liability; (2) that the Court approve the bond of petitioner, Black Diamond, in the sum of $325,000, as the amount to which liability might be limited under the Belgian limitation law, although under the United States statute the bond required would be at least $1,000,000, representing the value of the vessel after the collision; (3) that the Court restrain the prosecution or commencement of suits against the "Norwalk Victory" or her owners in respect of damages occasioned by the collision; (4) that all damage claimants be cited to file and make due proof of their claims in the limitation proceeding, and (5) that damages decreed be satisfied *pro rata* out of the limitation fund, and that the petitioner be discharged from all further liability (R. 9-10).

The petition was dismissed on respondents' exceptions (R. 12-13) questioning the competency and relevancy of petitioners' allegations that the Belgian limitation of liability law should be applied, and questioning the sufficiency of the bond of Black Diamond. The District Court (R. 14-15) dismissed the petition and held that shipowners, seeking to invoke the jurisdiction of a United States court in limitation of liability proceedings, must comply with the conditions and requirements of the statutes and Admiralty Rules of the United States, since limitation of liability

pertains to remedy and is governed exclusively by the law of the forum (R. S. 4283, 4285; 46 U. S. C. 483, 485; Admiralty Rules 51-54). The Court of Appeals affirmed, without, however, passing on the issues raised by the respondents' exceptions (R. 25-27).

Questions Presented.

Broadly, the ultimate question sought to be resolved is whether the law of the forum, as evidenced by the statutes and rules of court of the United States applicable to limitation of shipowners' liability, rather than the Belgian law on the subject, shall apply in a proceeding in admiralty in the United States arising out of a collision in Belgian territorial waters.

The principal definitive questions are:

1. Whether the District Court erred in following *The Titanic*, 233 U. S. 718, and *Royal Mail Steam Packet Co.* v. *Companhia de Navegaco Lloyd Brasileiro* (E. D. N. Y. 1928), 31 F. (2d) 757, and in holding that the privilege of a vessel owner to institute a limitation of liability proceeding in a United States court is derived from, created and exclusively controlled by the applicable statutes of the United States, for the reason that limitation of liability does not involve nor does it create substantive rights giving rise to liability, but pertains to the remedy and is, accordingly, governed by the law of the forum.

2. Whether the Court of Appeals erred in affirming the order of the District Court, which dismissed the petition for limitation of liability because it sought to invoke foreign law pertaining to remedy, and because the bond furnished by petitioner, Black Diamond

Steamship Corp., in the sum of $325,000, was on its face inadequate to meet the requirements of the remedial statutes and rules of the forum.

3. Whether a shipowner whose vessel is worth $1,000,000, and who has been sued in the United States for $1,000,000 by cargo-damage claimants, is entitled to maintain any proceeding for *limitation* of liability when he alleges that his liability as a matter of substantive right does not exceed $325,000.

Statutes and Rules Involved.

The pertinent United States statutes are R. S. 4283 and R. S. 4285 (46 U. S. C. 483, 485).

The applicable rules relating to limitation of shipowners' liability are Admiralty Rules 51 to 54, inclusive, of this Court.

The Belgian statute on limitation upon shipowners' liability is alleged in the petition and concededly is intended to conform to the International Convention for the Unification of Certain Rules Relating to the Limitation of Liability of Owners of Seagoing Vessels, signed at Brussels, August 25, 1924 (6 BENEDICT ON ADMIRALTY (6th ed. 1941), pp. 87-91). Pertinent provisions of the United States statutes and the Belgian law, as alleged, are in the Appendix hereto.

The Opinions Below.

The opinion, findings of fact and conclusions of law of the District Court of the United States for the Eastern District of New York (R. 14-19) are not officially reported (but see 1948 A. M. C. 816 for a summary). The opinion of the Court of Appeals

for the Second Circuit (R. 25-27) is reported at 167 F. (2d) 308, and in 1948 A. M. C. 815.

1. The District Court:

The basis for the order of the District Court, dismissing the petition for limitation of liability which attempted to invoke the Belgian law, is set forth in its order and conclusions of law (R. 15, 18-19).

The court sustained the exceptions of damage claimants, the respondents herein, and dismissed the petition on the authority of *Oceanic Steam Navigation Co.* v. *Mellor* (*The Titanic*), 233 U. S. 718, and *Royal Mail Steam Packet Co.* v. *Companhia de Navegaco Lloyd Brasileiro* (E. D. N. Y. 1928), 31 F. (2d) 737 (R. 15). It held that statutory limitation upon the liability of a shipowner does not create substantive rights giving rise to liability, but pertains to a matter of remedy (R. 19). (It avails to the shipowner a remedy analogous to bankruptcy, whereby judgment creditors are forced to resort to a limitation fund, deposited by the shipowner, to be prorated among such creditors, after which the shipowner is fully discharged from all further liability in respect of his tort.) Such matters of remedy, the District Court held, are controlled exclusively by the statutes of the forum, regardless of where the liabilities of the shipowner may arise (R. 14-15, 18-19).

2. The Court of Appeals:

In its opinion, *United States, et al.* v. *Robert Stewart & Sons, Ltd., et als.*, 167 F. (2d) 308, the Court of Appeals affirmed the order dismissing the petition, but on different grounds than those of the

District Court, and on a theory not advanced by counsel in their arguments before the Court.

The court below, unlike the District Court, did not deem it necessary to decide what limitation of liability law should apply in the United States courts. It construed the allegations of the limitation petition liberally as if petitioners had alleged "that the Belgian law did attach to the right" (R. 26). However, in so construing the petition for purposes of considering the respondents' exceptions, the court was careful to point out that it wished "to guard against any inference that this is our own interpretation" of the Belgian law (R. 26). We gather from petitioners' briefs that counsel may have overlooked the fact that the court did not hold that the Belgian limitation law attaches to the right, as a part of Belgian substantive law, rather than the remedy. What the court below did was to assume, by giving the petition the most liberal construction possible, that the petitioners had pleaded, as an allegation of fact in respect of foreign law, that the foreign limitation law attaches to the right (R. 26). This the court considered to be conclusive for the purpose of the exceptions.

The court, having adopted the assumption that the pleadings alleged the Belgian limitation law to attach to the right, and having accepted such assumed allegation to be binding on the exceptants, followed through to syllogistic conclusions flowing from that assumption. If the petitioners' allegation that the Belgian limitation law attaches to the right is a fact properly pleadable and binding as such on the exceptants, then it must follow that petitioners' maximum liability under the substantive foreign law alleged cannot exceed $325,000 (R. 27). In such

circumstances, there is no need for a petition to *limit* liability, as liability cannot, according to petitioners' allegations, exceed that sum. Thus, it is immaterial, said Judge Learned Hand, whether the Belgian law, with its $325,000 limit of liability, or the United States statutes, with a $1,000,000 limit here, is the proper one to be applied in a United States court. Further, he reasoned, if limitation of liability should become a problem, it may always be pleaded by way of defense in the answer to respondents' suit in admiralty against the owners of the "Norwalk Victory" (R. 27).

If, said the court below, the petitioners are wrong in their allegation that the Belgian limitation law attaches to the substantive rights—and the court refrained from passing on the question—then obviously the bond of petitioner, Black Diamond, in the sum of $325,000 is inadequate to support a petition under the applicable United States statutes (R. 27). The court indicated that petitioners, by their own argument, placed themselves in a dilemma in so far as they may have sought a *forum concursus* to the limited extent the United States courts could give it through the medium of a limitation proceeding. Further, it was indicated, as only one suit has been instituted against petitioners in the United States, and that is in admiralty, the need for a *forum concursus* is not apparent (R. 27).

It is the respondents' position that the court below erred in its basic assumption that a conclusion as to the nature of a foreign limitation law may properly be pleaded as if a fact. We submit that such conclusion is solely a question of law to be determined by the courts on facts properly pleaded, and

that the court below should have passed squarely upon the respondents' exceptions as did the District Court.[2]

Summary of Argument.

I.

Limitation upon the liability of shipowners, whereby the owners of a guilty ship may discharge liabilities to third parties for less than full damages, stems from European protectionist doctrines in the 17th century. Its origins, nature and procedures illustrate why the courts have always held that it pertains to remedy, and that the statutes of the forum relating thereto are applicable exclusively, regardless of where the substantive obligation may have originated.

The first United States statute in 1851, patterned after the English as it then stood, was intended to put American shipping on a basis of equality with that of foreign nations, and to encourage investors in shipping so that this branch of enterprise, in which the corporate form was not then common, might afford the same limited liability benefits as corporate investments such as "mining and manufacturing". *Norwich & N. Y. Trans. Co.* v. *Wright* (1872), 13 Wall. 104, 121.

The principle is that "full indemnity, the natural

[2] The question in respect of the law applicable to limitation upon shipowners' liability in cases involving foreign collisions was determined on exceptions in *The Titanic* (1914), 233 U. S. 718; *The Mandu* (C. C. A. 2nd 1939), 102 F. (2d) 459; *Royal Mail Steam Packet Co.* v. *Companhia de Navegaco Lloyd Brasileiro* (E. D. N. Y. 1928), 31 F. (2d) 757; and in *The State of Virginia* (E. D. N. Y. 1894), 60 F. 1018. Each case held for the law of the forum.

right of justice, shall be abridged for political reasons". *The Amalia* (1863), 1 Moo. P. C. N. S. 471, 473.

Following the "Morro Castle" fire in 1934 the Congress reflected a stiffened public policy as regards shipowners' limitation, and provided a minimum fund of $60 per gross ton for death and personal injury claimants; it expressly extended the limitation benefits to foreign shipowners, and made the masters' privity or knowledge as to unseaworthiness imputable to owners so as to defeat the right to limit.[3] This is to protect the lives of those who sail the seas.

All systems of limitation stem from the same origins, but the formula for determining the limitation fund varies with the forum. The United States statutes provide a greater benefit to shipowners when their vessel is a total loss or seriously damaged, but the Belgian law would afford a greater benefit if, as in the case of the "Norwalk Victory", she is undamaged; in either event, the United States statutes now provide the greater guarantee to death and injury claimants.

II.

Procedures on limitation of liability in the United States, in England, and in Belgium, whose law is patterned after that in England today, all reflect the remedial nature of limitation. Before limitation of liability becomes of practical consequence, the shipowner's liability must first be determined under applicable substantive law. If the damages for which the shipowner must respond exceed the amount of limitation as fixed by the formula of the forum, then

[3] Public No. 391, 79th Cong., August 29, 1935; 49 Stat. 960, 46 U. S. C. 183.

proceedings analogous to bankruptcy, or a creditors' bill, avail to the owner of the guilty ship a remedy whereby damage claims are filed and proved. The limited fund is then distributed *pari passu*, and the judgment debtor is discharged.

III.

That limitation of liability affords a remedy and is governed exclusively by the law of the forum has been settled in the United States for many years, and no foreign system has ever been superimposed. In *The Titanic*, 233 U. S. 718, Mr. Justice Holmes drew the distinction between substantive rules of collision liability, governed by the *lex loci delicti*, and limitation upon that liability, controlled by the *lex fori*. *The Titanic* involved a high seas collision of that British ship with an iceberg, and the *lex loci delicti* was considered the law of the flag; yet the shipowner, in a United States forum, was held subject to the United States limitation statutes as pertaining to a matter of remedy.

Because the "Titanic" was a total loss, the United States statutes favored the shipowner; in the instant case the "Norwalk Victory", undamaged by the collision, would be favored by foreign limitation law. The shoe is simply on the other foot, but the law of *The Titanic* remains applicable; for like holdings, see *The State of Virginia* (E. D. N. Y. 1894), 60 F. 1018 (British ship stranded in British territory); *Royal Mail Steam Packet Co.* v. *Companhia de Navegaco Lloyd Brasileiro* (E. D. N. Y. 1928), 31 F. (2d) 757 (Collision between British and Brazilian vessels in Belgium); *The Mandu* (C. C. A. 2nd 1939),

102 F. (2d) 459x (Collision between Brazilian and German vessels in Brazil); RESTATEMENT, CONFLICT OF LAWS, §411.

IV.

The Court of Appeals was correct in affirming the order of the District Court which dismissed the petition for limitation because it sought to invoke an inapplicable foreign law pertaining to the remedy. However, the reasons stated in the intermediate court's opinion do not meet the respondents' exceptions, which go to the conflict of laws question. The court below erred in assuming that petitioners could plead as if a fact (binding on exceptants) that the Belgian limitation of liability law attaches to the right. That is a conclusion of law, is not properly pleadable as a fact, and is the basis for exceptions under General Admiralty Rule 27. *The Titanic* and all other conflict of laws cases on limitation of liability, similar to the case at Bar, arose and were decided on exceptions.

V.

Petitioner, United States of America, has specified as error the fact that the court below did not in so many words hold that the Government is not required to post a bond or stipulation in limitation of liability proceedings. No bond was required of the Government, no exceptions were taken to it not filing a bond, the fact that no such bond is required was conceded below, and the specification has no place in the debate. The United States is only a nominal party here. However the exceptions were properly

applied to it because the petitioner sought to invoke an inapplicable foreign remedial law, wholly apart from any question as to the sufficiency of Black Diamond's bond.

VI.

If petitioners have been denied a *forum concursus*, it is of their own, and not of the courts', making. At best petitioners could only obtain, in a limitation proceeding in the United States, a concourse of claims asserted in the United States. This they have anyhow, because cargo claimants (respondents here) have all joined in one suit in admiralty against petitioners. Our courts cannot restrain foreigners in proceedings abroad, and this was observed by the Court in *The Titanic*. The only other suit so far reported after almost two years is that pending in England on behalf of the "Mirganser" hull interests, and there Black Diamond voluntarily appeared, although its vessels do not trade to English ports, and posted bail of $1,000,000. If Belgian limitation law attached to the right, as petitioners here argue, the bail in England would obviously not have exceeded $325,000, the limit under both English and Belgian limitation statutes. Further, if petitioners really had desired a *forum concursus*, so far as a United States court could give it, Black Diamond should have posted a bond in the District Court in the sum of $1,000,000, as required by United States law; instead it chose to invoke an inapplicable foreign statute and to ignore the requirements of the forum and the precedents holding the United States statutes to apply to the exclusion of foreign limitation statutes.

If equities are to be considered, those in favor of

innocent cargo claimants may not be ignored; it hardly lies in petitioners' mouths to complain that the common law right of full indemnity be abridged to an extent greater than that provided by the applicable remedial statutes and policy of the forum.

ARGUMENT.

I.

Introduction.

It has long been held that the statutes on limitation of shipowners' liability do not create a substantive right, but that they pertain to the remedy, and, *a fortiori*, that the limitation of liability law of the forum is applicable, regardless of the place where the substantive liability arose. It was on the basis of this accepted doctrine that the District Court refused to permit petitioners in a domestic forum successfully to invoke a foreign system of limitation of liability. We believe that an explanation of the nature and history of limitation of shipowners' liability will make evident the soundness of the rule that if petitioners are entitled to any limitation upon their liability, it must be under and pursuant to the statutes of the forum.

The Nature and Origins of Limitation of Liability:

Limitation of shipowners' liability is a legislative concession predicated upon domestic policy. If a shipowner can show freedom from personal fault or privity, he may be allowed to discharge his liabilities, stemming from negligent navigation or management of his vessel, by paying into court a fixed sum, measured by the size or value of the vessel.

The measure of the limitation fund varies according to the statute of the forum.

The theory of such limitation has been called "singular" and "*sui generis*".[4] Although it has been said that the principle stems from time immemorial, and is therefore to be considered as if deriving from the general maritime law, it seems more accurate to state that it is a singular creature of municipal legislation. Marsden, in his classic work on *Collisions at Sea* (9th ed. 1934), points out that its origins cannot be traced to the Roman law, or to any of the mediaeval maritime codes, which recognized, as to liability for collision, the principle of full indemnity as the natural right of justice. *Id.* pp. 161-163; *The Main* v. *Williams* (1894), 152 U. S. 126. His well-documented volume has traced the origins to protectionist doctrines in the early 17th century. Limitation laws then appeared in Holland and other continental nations, and followed much later in England and the United States.

The History and Purpose of the United States Statutes:

Massachusetts, in 1818, and Maine, in 1821, enacted legislation on limitation of shipowners' liability, patterned after the original British Act of Geo. 2 (1734). The Congress, however, was not prompted to pass a federal statute until after the Court, in 1848, decided *The Lexington* (*New Jersey Steam Navigation Co.* v. *Merchants Bank*), 6 How. 344. The owners of the "Lexington" were held liable for the full value of a shipment of currency, although the nature of the cargo had not been disclosed to them

[4] MARSDEN, COLLISIONS AT SEA (9th ed., 1934), p. 164; *The Nevada* (C. C. A. 9th, 1936), 81 F. (2d) 744.

by the shipper. This is said to have caused great uneasiness among shipowners, and in 1851, the Congress enacted a Limited Liability Act, R. S. 4282-4289, following the then British law.

Under the Act of 1851, as now amended, the owners of certain classes of seagoing vessels, if they are found free from personal "privity or knowledge" (as distinguished from the negligence of crews in the navigation and management of ships), are entitled to limit their liability to the value of their interest in the vessel and pending freights. In the United States the owners' "interest" is construed to mean the value of the vessel and freight moneys after the disaster; insurance proceeds are no part of the "interest". *The Great Western* (1886), 118 U. S. 520. Where the limitation fund is inadequate to satisfy all damage claimants, an additional fund of $60 per ton has been required since 1935, in respect of death and personal injury claims.[5]

The principle of limitation of shipowners' liability, which is in derogation of the common law right of full indemnity against tort-feasors, was intended originally to promote the national merchant marine of the country adopting the theory. With such purpose, the British statutes, until 1854, denied the privilege to foreign ships; however, in the United States the Court held, in 1882, that the Act of 1851, being general in its terms, applied to all owners of vessels, whether American or foreign, without distinction or discrimination.[6] To remove any further possible

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[5] 3 BENEDICT, ADMIRALTY (6th ed. 1940) §§476-478; ROBINSON ON ADMIRALTY (1939), p. 879, n. 16.

[6] MARSDEN, COLLISIONS AT SEA, p. 166; *The Scotland* (1882), 105 U. S. 24, 30.

doubt, the Congress in 1935, expressly extended the law to owners of foreign ships.[7]

As each maritime nation adopted some form of limitation of liability, it is obvious that fears of reprisal, or the interests of comity, compelled maritime nations to extend to foreign shipowners the same benefits in respect of limitation of liability as were extended to their own; all were put on an equal basis before the same forum.

In *Norwich & N. Y. Trans. Co.* v. *Wright*, (1872), 13 Wall. 104, Mr. Justice Bradley pointed out that the great object of our limitation law was to encourage "shipbuilding and to induce capitalists to invest money in this branch of the industry" (p. 121). Comparing the unlimited liability of the shipowner, prior to the Act of 1851, with other business enterprises, the court observed that many enterprises, such as mining and manufacturing, would not attract private investors unless there were available "corporate institutions by which they are exempt from personal liability, or from liability except to a limited extent". The shipowners, the Court indicated, were entitled to the same advantages as a matter of the "public interest" (p. 121).

Until the latter 19th century, it was, of course, common for individuals, often the captains themselves, to own one or more sailing vessels. Frequently ownership was divided among a group on a share or partnership basis.[8] Corporate ownership of ships was a rarity; outright Government subsidies and the preferred ship mortgage were then unavailable. Today all this has changed, and the original purposes of

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[7] Public No. 391, 74th Cong., August 29, 1935; 49 Stat. 960, 46 U. S. C. 183.

[8] See I Parsons, Maritime Law (1859), Ch. IV.

limitation of liability, as a national subvention, are archaic.

Now limitation of liability is described merely as the shipowner's "first line of defense".[9] The corporate device, preferred ship mortgages, and operating and construction subsidies afford the chief inducements to investment in and operation of an American Merchant Marine.[10]

> "A cautious shipowner may incorporate each ship as a separate venture, charter her to an independent chartering agency, mortgage her to a financial company and in other ways familiar to all types of enterprise obstruct the path of the creditor" (3 Benedict, op. cit. *supra*, 544).
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> * * * *
>
> "Where the whole assets of the company consist of the ship that does the damage, and she is sunk in collision, the injured party is without redress" (Marsden, *supra*, p. 181).

A change of public policy with regard to limitation of shipowners' liability was evidenced in the United States following the disastrous "Morro Castle" fire,[11] Just as the loss of the "Lexington", in 1848, prompted the Congress to enact its first limitation of liability statute, in 1851, so the loss of the "Morro Castle", in 1934, prompted a reconsideration of the statute. It enacted the amendments of 1935 and 1936 which require a shipowner, in cases of loss of life and bodily injury, to respond up to $60 per gross ton of the

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[9] 3 BENEDICT, ADMIRALTY (6th ed.), p. 647.

[10] Ship Mortgage Act, 1920, 46 U. S. C. 911, *et seq.*; Merchant Marine Act, 1936, 46 U. S. C. 1151-1182.

[11] ROBINSON, ADMIRALTY, p. 880, n. 17; 3 BENEDICT, ADMIRALTY (6th ed.), p. 316.

vessel involved, and require as a further condition of the right to limitation in such cases, that the shipowner prove not only its personal freedom from "privity or knowledge", but also that of the vessel's master. By these amendments (expressly made applicable to domestic and foreign shipowners alike), it was made plain that the Congress intended to "increase the protection of the lives of persons traveling on vessels which sail the high seas, but * * * also leave undisturbed the position which cargo claimants have held since the enactment in 1851 of the original Limitation of Liability Act". *Report of the Senate Commerce Committee*, No. 2061, 74th Cong., 2nd Sess., p. 3 (May 1936).[12]

No distinction is made in our statutes on limitation of liability between American or foreign vessels, or the place where the obligation sought to be limited may arise.

English Statutes:

As the American law is derived from the early English statutes, some consideration of them seems pertinent. The germ of the theory is first evidenced in England in 1734, when the Act of Geo. 2, c. 15, was passed. It limited shipowners' liability for loss of cargo, by theft of the master or crew, to the value of the vessel and her freights. Limitation of liability was extended in England to cases of collision by Act of 53 Geo. 3, c. 159 (1813), and the British statutes are recognized as the forerunners of the earliest American legislation on the subject. *The Main* v. *Williams*, *supra*. The preamble of the English act

[12] The laws of some foreign countries provide no such minimum fund, and all responsibility is avoided if the ship is a total loss. See 3 BENEDICT, ADMIRALTY (6th ed.), pp. 643-647.

of 1813 shows that limitation of liability was founded upon considerations of policy, and not of justice. "The principle of limited liability is that full indemnity, the natural right of justice, shall be abridged for political reasons", said Dr. Lushington, in *The Amalia* (1863), 1 Moo. P. C. N. S. 471, 473.

The British Act of 53 Geo. 3 confined the benefits of limited liability to British ships. Since 1854 the benefits have been extended to shipowners, whether British or foreign.[13]

In England, since 1854, in those cases where the remedy of limitation is available to owners, liability may be limited to £8 per ton, with an additional fund of £7 for loss of life and personal injury claims. If the £7 fund is inadequate to satisfy liabilities for death and personal injury, then such claimants rank, as to any excess, *pari passu* with the cargo claimants in distribution of the £8 fund.[13a]

The Brussels Limitation of Liability Convention of 1924 (Belgian Law):

In the shipowners' petition filed with the District Court, it is alleged that the Belgian law on limitation upon shipowners' liability "is the International Convention for the Unification of Certain Rules of Law Relating to the Limitation of the Liability of the Owners of Seagoing Vessels, which was signed at Brussels on August 25, 1924, and ratified by Belgium on June 2, 1930" (R. 6) (See Appendix, p. 49).

Neither the United States nor England has ratified or adhered to the Convention, and it may be noted

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[13] MARSDEN, COLLISIONS AT SEA (9th ed.), pp. 165, 166; CARVER, CARRIAGE OF GOODS BY SEA (8th ed. 1938), p. 38.

[13a] MARSDEN, *op. cit. supra*, p. 179.

that in the United States at least the minimum guarantees to personal injury and death claimants are considerably higher ($60 per ton) than those afforded by the rule of the Convention ($28 per ton). It is noteworthy that Article 12 of the Convention reserves the right of the Contracting States not to apply the Convention rules in favor of the nationals of a non-contracting State. In the instant case, it is therefore at least questionable whether even a Belgian court would enforce the Convention rule in favor of the American "Norwalk Victory".

It may be observed, further, that while the great objective of the Convention was to establish uniformity in each forum, particularly with regard to the amount of the limitation fund, it has failed in this objective. By Article 15 of the Convention, each contracting State reserved to itself the right to convert the sums stated by the Convention in pounds sterling into terms of its own monetary system, in round figures. Belgium converted £8 per ton into 1,400 francs per ton, and all other contracting countries converted the limitation sum into terms of their own currencies at then current rates of exchange. With the complete unstabilization of currencies following World War II, the actual measure of limitation now varies sharply from State to State, with absurd results. This unanticipated weakness in the Convention prompted the Comité Maritime International, which conceived the Convention rule, to convene at Antwerp in September, 1947, and reconsider the Convention. No practical formula for attaining uniformity was evolved. The consensus was that "the only standard which can be adopted for the purpose of equiparating limits of liability is that

which is hoped will ultimately be achieved by the International Monetary Fund".[14]

Since, by its own terms, the Brussels Convention of 1924, alleged by petitioners to be the law of Belgium, need not be applied in favor of the nationals of a non-contracting State, it seems clear that even had the owners of the "Norwalk Victory" applied for limitation of liability in Belgium, it could not be said with any assurance that the law of the Convention would have been applied in their favor.

The compelling objective of the Convention, uniformity in each forum, was, we submit, predicated at least in part on the universal assumption that each State applies the *lex fori* in matters of limitation, and the hope was for a uniform limit of liability to prevent a "shopping around" for the most favorable forum.[15] As explained above, such uniformity has not been achieved, even among the contracting States which adopted the Convention.

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[14] "The Unification of Maritime and Commercial Law through the Comité Maritime International", by Lord Justice, Sir Leslie Scott and Cyril Miller. *The International Law Quarterly*, Vol. I, No. 4, 1947.

[15] See ROBINSON ON ADMIRALTY, pp. 902-904.

II.

The procedures on limitation of shipowners' liability illustrate that limitation statutes create no substantive rights but merely afford a remedy in respect of liabilities already assumed to exist.

In holding that limitation of liability is a matter of remedy as to which the statutes and admiralty rules of the forum govern exclusively, the District Court (R. 18-19) followed a rule consistently applied by the courts of the United States for over fifty years. An examination of limitation of liability procedures will further illustrate why this has been and should be so.

American Procedure:

Procedure for limitation of shipowners' liability is governed by Rules 51, 52, 53 and 54 of the Admiralty Rules of this Court, as amended June 21, 1948. A typical situation where they come into play is illustrated by a collision such as in the case at Bar. When a vessel collides with another and causes damage to the latter and persons and property on board, the shipowner whose vessel has caused such damage is faced with a possibility of a multiplicity of suits by the respective claimants. Under the general Admiralty Rules of this Court he may, upon compliance with statutory conditions (46 U. S. C. 185), by petition invoke the jurisdiction of the Admiralty Court. A condition to the court entertaining the petition is that the shipowner deposit a bond or stipulation for the value of his interest in the vessel and her pending freight, or else transfer his interest therein to a

trustee.[16] When this is done, the court will forthwith issue an order enjoining the prosecution of all suits, will cite damage claimants to file their claims in a limitation proceeding and answer the allegations of the petition if they will.

From the above it is evident that an incident of a limitation of liability proceeding in the United States is that all claims and actions within the reach and processes of the court are consolidated, and to that extent a multiplicity of actions may be avoided. If the petitioner's vessel is found at fault on the merits by the Admiralty Court under the substantive rules of collision liability appplicable to the case, then the next question for determination by the court is whether the petitioner has proved his freedom from personal "privity or knowledge" (as distinguished in the negligence of his servants), so as to be entitled to limit. If he sustains this burden of proof, he is entitled to a decree limiting his liability.

Whether a shipowner qualifies for limitation of liability, so that he may discharge his liabilities at less than full value, is of real importance only after his negligence has been established under the applicable substantive law. Thus it is that the petitioner prays (1) for exoneration from liability; failing which he begs (2) limitation of liability (R. 8-9).

If the shipowner obtains exoneration under the applicable substantive law after trial on the merits, that, of course, ends the entire case. If, on the other hand, he is found liable but nevertheless entitled to a limitation upon his liability, then the damage claimants must prove their claims before a commissioner. If the damages exceed the amount of the limitation fund,

[16] A bond is waived where the Government is involved. 46 U. S. C. 743; 28 U. S. C. 2408.

it is prorated among the damage claimants, and the petitioner is discharged from further liability.

English Procedure:

The English procedure points up the remedial nature of limitation of liability even more clearly. In England, liability must first be determined on the merits in court, or else confessed by the shipowner, before a limitation proceeding may be instituted.[17] Testimony is then heard and determination made by the court as to whether the shipowner is entitled to limitation upon the liability already established, and this depends on a finding, as in the United States, that he is free of personal or "actual fault or privity" as distinguished from the fault of his servants. If the determination is in petitioner's favor, the matter is referred to a Registrar, who, after due advertisement, receives and evaluates the claims, much as would a Referee in Bankruptcy. The Registrar's report is submitted to the Judge, and if approved, an order is entered directing the limitation fund to be prorated among the damage claimants.[18]

Belgian Procedure:

The Belgian procedure is further illustrative. When a collision occurs and Belgian jurisdiction is invoked, one of the shipowners applies immediately to the Tribunal de Commerce for the appointment of an "expert" to investigate the facts of the collision and report thereon to the Court. The "expert" is a member of the "Commission Nautique du Tribunal",

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[17] See *Norwich Co.* v. *Wright* (1872), 13 Wall. 104, 118; *Hill* v. *Andus* (1855), 24 L. J. Ch. 229, 231.

[18] Roscoe's Admiralty Practice (5th ed.), at p. 237, *et seq.*; Williams and Bruce, Admiralty Practice (3rd ed.), pp. 377-388; Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), §§502-509.

usually a former sea captain, and is an officer of the court. The nautical expert inspects the vessels, surveys the damaged cargo, evaluates the damage, examines witnesses, and thereafter submits his report and opinion as to the cause of the collision and the extent of damages. The report is not binding, but naturally carries great weight with the court.

The shipowner whose vessel has been declared free of fault by the nautical expert then obtains issuance of a writ against the guilty vessel, whose owner puts up a bond or a bank guaranty for the full amount of the damage, with a proviso, however, that such bond or guaranty is subject to reservation of the owner's right to claim limitation of liability. Pleadings are then filed (points of claim and defense), and the case is argued before a Judge of the Tribunal de Commerce on the basis of the evidence contained in the nautical expert's report.

Upon judgment being rendered by the court, for the full damages, the unsuccessful party, if the damages are in excess of the amount he would have to pay in case he were allowed to limit, applies to the court and asks that a trustee or liquidator be appointed. The liquidator is furnished with a list of known claimants or creditors, and at the same time the owner deposits with the liquidator the amount to which he may limit his liability, plus interest to date, plus costs of the liquidator.

If any of the claimants are of the opinion that the owner does not have a right to limit, they may apply to the court and ask that the question be determined. The burden is on the claimant to show that the owner was guilty of personal fault (cf. "privity or knowledge" under American law, and "fault or privity" under British law, with the burden on the shipowner).

If, as is usually the case, the shipowner is held entitled to limitation upon the liability already determined to exist, then the liquidator proceeds precisely as under Bankruptcy procedure in Belgium, and publishes a notice in the official journal calling upon all claimants to file and prove their claims within a certain time. The fund is apportioned between the claimants, and the debtor is then discharged.[19]

All Procedures Illustrate Limitation as a Remedy:

Regardless of the forum, whether American, British, or Belgian, the procedures for limitation upon shipowners' liability stamp it indelibly as a matter of remedy. Before limitation comes into effective play, the petitioner must have been found liable under the applicable substantive law creating the liability, and if the full damages for which a shipowner has been found liable exceed the amount to which he may be entitled to limit his liability, then the remedy of limitation upon that liability becomes important, and follows as in a creditors' bill or bankruptcy.

[19] The Belgian procedure outlined above was ascertained by personal consultations with three active maritime lawyers of Antwerp, examination of the Belgian statutes, and perusal of the Court records in the case of *Cie. Maritime Belge (S. S. Persier)* v. *S. S. Baron Blythswood*, Tribunal de Commerce, Antwerp, 1939.

III.

The rule that limitation upon liability affords a remedy governed by the law of the forum is distinct from the rule that *lex loci delicti* controls in the determination of liability; and limitation of liability should not be confused with statutes creating rights unknown to the common law and which by their terms limit the right thus created and the remedy attached to it.

It is important that distinction be made between the conflict of laws rule with respect to liability for tort, generally governed by the *lex loci delicti*, and the rule applicable to limitation of liability, which is quite another thing. The distinction is recognized in the RESTATEMENT, CONFLICT OF LAWS, sections 409 and 411:

> "Sec. 409. Liability for an alleged tort caused by collision in the territorial waters of a state is governed by the law of that state."
>
> * * * * *
>
> "Sec. 411. The limitation of liability in a maritime cause of action is determined by the law of the forum irrespective of the law which created the cause of action."

A case which graphically illustrates this point is *The Mandu* (C. C. A. 2nd 1939), 102 F. (2d) 459. There a Brazilian steamer and a German steamer collided in Brazilian waters. The first question was whether, if both vessels were at fault, the Brazilian law of apportioning liability in accordance with degree of fault, or the American rule of dividing the dam-

ages equally, should be applied. As to that, the court said:

> "Liability for tort if caused by collision in the territorial waters of a foreign country is governed by the laws of that country. *Smith* v. *Condry*, 1 How. 28, 11 L. Ed. 35; Restatement of Conflict of Laws, section 409. That law not only determines the existence of liability, but also generally determines the measure of it" (p. 463).

The second question in the case was: What law should govern as to limitation of liability? Holding for the law of the forum, Judge Patterson said in the opinion:

> "But on limitation of liability in maritime cases the statutes permitting limitation are regarded as relating to remedy, and the law of the forum controls. *The Titanic*, 233 U. S. 718. * * *, Restatement of Conflict of Laws, Section 411; * * * the extent of the liability will in no event exceed what is proper under * * * the law of Brazil (Collisions Convention) * * * and the Mandu's right further to limit liability, if any, will be decided according to our own statutes on the right of a shipowner to limit his liability" (p. 463).[20]

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[20] The so-called Brussels Convention on Limitation of Liability, 1924, should not be confused with the Brussels Collisions Convention, 1910. Belgium has adopted both Conventions; the United States neither; and England has adopted the Collisions Convention but not the Limitation of Liability Convention. Under Belgian collision law, incorporating the rules of the Collisions Convention, in mutual fault cases liability is determined in proportion to degree of fault, viz., vessel A may recover say 40 per cent of her damages from vessel B, and vessel B will recover 60 per cent from vessel A, and fault in like degree is imputed to cargo on each vessel. Under the substantive rules of collision

[Footnote continued on following page.]

In the instant case, the conflict of laws question on limitation of liability is in substance the same as was certified by the Circuit Court of Appeals in *The Titanic*, 209 Fed. 513. The tragic facts giving rise to that case are too well remembered to require a telling here. Because the "Titanic" was a total loss, her owners enjoyed a decided advantage by raising the limitation umbrella in the United States. Consequently, when the "Titanic" owners sought the American forum and petitioned for limitation of liability, the record claimants, one British and one American, strenuously asserted that the British law should govern. They argued that a collision of a British ship with an iceberg on the high seas could involve no law but that of the flag of the ship; it was exactly the same, they said, as if the collision had occurred in British territorial waters, and the *lex loci* was the law of England. So, in *The Titanic*, the District Court said:

> "If the owners of the 'Titanic' under these circumstances can obtain a limitation of their li-

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[Footnote continued from preceding page.]

liability in the United States, if both vessels are to blame, damages are divided regardless of degree of fault. *The North Star* (1882), 106 U. S. 17. And in the United States innocent cargo may recover in full from the guilty non-carrying vessel, which recoups half of those damages from the carrying ship. *The Chattahoochee* (1899), 173 U. S. 540. *The Mandu*, cited *supra* in the text, applied the foreign *lex loci delicti* (which was the law of the Collisions Convention) in the determination of substantive collision liability and damages, and the *lex fori* in respect of limitation of liability.

Article 10 of the Collisions Convention expressly reserves that "the provisions of this Convention shall not affect in any way the rules in force in each country with regard to limitation of shipowners' liability, * * *." *Hearings on Brussels Collisions Convention, Subcommittee of the Committee on Foreign Relations, United States Senate*, January 10-14, 1938, p. 10; 6 BENEDICT ON ADMIRALTY (6th ed. 1941), p. 5.

ability in this Court, they could have obtained it if she had foundered in the harbor of Southampton, immediately after she started on her voyage, and while still undoubtedly within the territorial jurisdiction of England" (209 F. at p. 512).

It was on the premise that the "Titanic" might as well have foundered in British territorial waters that the case was argued and determined. This assumption is in accord with the general rule of maritime law "that tort liability on the high seas is determined by the law of the flag". *Sonneson* v. *Panama Transport Co.* (N. Y. Court of Appeals, November 24, 1948), 120 N. Y. L. J. No. 108, p. 1; and see *O'Neil* v. *Cunard White Star* (C. C. A. 2nd 1947), 160 F. (2d) 446, 448; RESTATEMENT, CONFLICT OF LAWS, Sec. 406; ROBINSON ON ADMIRALTY, pp. 238-239. There is, therefore, no distinction in law to be drawn between *The Titanic* and the instant case, merely because there the collision occurred on the high seas whereas here it was in Belgian waters.

Mr. Justice Holmes, speaking for the Court in *The Titanic*, met the specific question: "Will the courts of the United States in such a proceeding enforce the law of the United States or of the foreign country in respect to the amount of such owner's liability?" He answered that the American statute should govern.

The Court brought in focus the sometimes overlooked distinction between substantive obligations founded upon foreign law, and limitations upon the remedy incident to enforcement of such obligations in a local forum. It pointed out that limitation of shipowners' liability "does not impose, but only limits, the liability—a liability assumed already to exist on

other grounds", and held for the law of the forum (p. 733).

The Titanic is not lightly to be dismissed, as the Government's brief would have it, as distinguishable from the case at Bar. The ultimate question, as here, was whether the foreign limitation statutes of the *locus delicti* or those of the forum govern. There is no distinction in the principle merely because in *The Titanic* the shipowner contended the statutes of the forum applied, and damage claimants contended for the *lex loci delicti*; whereas in the instant case the shipowners contend for the *lex loci delicti*, and damage claimants contend for the law of the forum. Here the shoe is simply on the other foot. Surely had the American "Norwalk Victory", rather than the British "Merganser", become a total loss following the collision, petitioners would be the first to invoke the greater benefits in those circumstances available under the United States statutes.

The Court made it quite clear in *The Titanic* that the limitation of liability statutes announce "a general policy" for the administration of justice in maritime cases governing all suits that are brought in the courts of the United States (233 U. S. at pp. 733-734).

The much quoted case of *The Scotland* (1882), 105 U. S. 24, arose out of a collision between "The Scotland", a British ship, and the "Kate Dyer", an American ship, on the high seas. The trial court found the British owners wholly at fault, and the question then arose whether they could limit their liability to the value of the vessel (which was zero) and a few thousand dollars in freight moneys in accordance with American law, or whether the British statute, with

its higher limit, measured by tonnage, should apply. The Court held that the American statutes on limitation of liability govern. In his opinion, Mr. Justice Bradley covered a wide scope of hypothetical collision situations. Having reference to substantive rules of collision liability, as this Court later made clear, Mr. Justice Bradley said in the opinion:

> "* * * if a collision should occur in British waters, at least between British ships, and the injured party should seek relief in our courts, we would administer justice according to the British law, so far as the rights and liabilities of the parties were concerned, provided it were shown what that law was" (p. 29).

Then, turning to the American limitation of liability statute, the Court said:

> "The Act of Congress creating a limited responsibility of shipowners in certain cases, * * * is general in its terms, extending to all owners of vessels without distinction or discrimination. * * * This statute declares the rule which the law-making power of this country regards as most just to be applied in maritime cases (p. 30). * * *"
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> "Of course the rule must be applied, if applied at all, as well when it operates against foreign ships as well as when it operates in their favor" (p. 31).
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> "* * * And public policy, in our view, requires that the rules of the maritime law, as accepted by the United States, should apply to all alike, as far as it can properly be done. * * * That rule (limitation of liability) and the mode of enforcing it are equally applicable to all. They are not restricted by the terms of the statute to any nation-

~~ality or~~ domicil. We think they should not be restricted by construction" (p. 33).

This simply means, as Mr. Justice Holmes indicated in *The Titanic*, that while obligation founded upon a foreign tort may involve rights which our courts will enforce under the rule *lex loci delicti*, nevertheless the privilege of allowing a limitation of liability is a matter of public policy governed by our own limitation of liability statutes. If the law of the forum is to control in one case, it controls in all, whether it is more, or less, favorable as compared with foreign statutes.

If further evidence of the holding in *The Scotland* were required, it is afforded by Judge Benedict's decision in *The State of Virginia* (E. D. N. Y. 1894), 60 F. 1018, which was decided two years later. The "State of Virginia" was a British vessel which stranded and became a total loss in British territory, and the court held the limitation statutes of the United States to be controlling.

In *La Bourgogne* (1908), 210 U. S. 95, the collision was between a British ship and a French ship on the high seas. Claims were allowed under French law for the death of passengers of the guilty French ship, but the American limitation statute was applied. The case illustrates the applicability of the remedy of the forum in respect of an obligation founded upon a foreign tort.[21]

[21] And see: *The Thingvalla* (C. C. A. 2nd 1891), 48 F. 764 (Collision between two Danish ships on the high seas); *The Norge* (S. D. N. Y. 1907), 156 F. 845 (Loss of Danish ship on high seas); *The Edmund Fanning* (Loss of Government-owned American ship and her cargo in Italian port March 13, 1947; the American limitation of liability statutes here have been invoked by the Government without question; now pending in the Southern District of New York, No. A. 152-42).

In dismissing the petition of the owners of the "Norwalk Victory" in the instant case, Judge Inch cited, as controlling, *The Titanic*, and the decision of Judge Campbell in the Eastern District of New York in *Royal Mail Steam Packet Co. v. Companhia de Navegaco Lloyd Brasileiro* (E. D. N. Y. 1928), 31 Fed. (2d) 757. In the latter case, collision occurred in the Scheldt River, Belgium, between a British steamer and a Brazilian steamer. Judge Campbell sustained exceptions to the allegation of the Brazilian shipowner that it was entitled in the United States court to the benefit of the Belgian limitation of liability law. He said:

> "* * * while the rights and liabilities of the parties will be determined in accordance with the law of the foreign country, the right to limit liability will be controlled by the limited liability statute of our country, which will be applied to foreign ships and foreign collisions. *The Scotland*, 105 U. S. 24, 26 L. Ed. 1001; *La Bourgogne*, 210 U. S. 95, 28 S. Ct. 664, 52 L. Ed. 973; *The Titanic* v. *Mellor*, 233 U. S. 718, 731, * * *.
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> "The Limited Liability Act of the United States (46 U. S. C. A. §181-195) does not impose, but only limits, an existing liability, and is not a part of the general maritime law, but is a declaration of general policy of the United States for the administration of justice in maritime cases. It relates not to the right or liability, but to the remedy, and that is governed by the law of the forum.
>
> "It is immaterial whether the collision took place on the high seas or in the territorial waters of Belgium, as in either event our courts will limit the liability in accordance with the statutes of the United States. *The State of Virginia* (D. C.), 60 F. 1018" (pp. 758-59).

Although appeal was taken on the merits, and the lower court affirmed, there was no appeal from Judge Campbell's ruling that the Belgian limitation of liability statute could not be resorted to in a United States court. *Royal Mail Steam Packet Co.* v. *Companhia de Navegação Lloyd Brasileiro*, 55 F. (2d) 1082, cert. den. 287 U. S. 607.

Irrespective of the source of the substantive right, "it is the general policy of our admiralty jurisprudence that where a petitioner invokes the process of our courts to limit its liability, the limitation provided in the United States statutes and none other shall apply". *Gypsum Prince-Voco* (Report of Special Commissioner, S. D. N. Y.), 1945 A. M. C. 585, 591 (not officially reported).

It is contended in the Government's brief (p. 30) that "While there may be justification, as *The Titanic*, *supra*, indicates, for the forum's refusal to impose a higher foreign limitation, * * * policy considerations cannot justify refusal to apply a lower foreign limitation." We submit it would be a strange rule that would afford the owner of a guilty ship the option of two laws, that of the forum or that of the *locus delicti*, depending on which favors him most in the circumstances. The rights of innocent claimants are better served by justice than to warrant so noxious a conclusion.

Cases cited by the petitioners which have applied the substantive rules of the *locus delicti* in the determination of collision liability (as *Smith* v. *Condry*, 1 How. 28) obviously fall into quite a different category. For another, petitioners have relied upon the decision on the merits in *The Mandu* (C. C. A. 2nd 1940), 114

F. (2d) 361, but the court had already in the same case, 102 F. (2d) 459, distinguished the rule as to determination of liability and the measure thereof under substantive law, from the applicability of *lex fori* in respect of limitation of liability. Nor are the non-maritime tort cases cited by the petitioners applicable. Such cases as *Slater* v. *Mexican R. R. Co.*, 194 U. S. 120, and *Western Union Telegraph Co.* v. *Brown*, 234 U. S. 542, involved statutes which created rights unknown to the common law, and by their terms defined the nature and extent of the corresponding obligations, and the method or measure of recovery. They have no bearing on whether the obligations so created may, as a matter of domestic policy of the forum be enforced in full. They fall under the rules referred to in RESTATEMENT, CONFLICT OF LAWS, §§409, 412 and 414; cf. Id., §411.

The authorities relied upon and followed by the District Court in sustaining respondents' exceptions to the petition, which asserts a foreign limitation statute, should be upheld, and the order of dismissal should be affirmed for the reasons stated by the District Court.

IV.

The court below should have met the issues presented as did the District Court, and it was improper to assume that a supposed allegation that the Belgian law attaches to the right must be accepted as a fact in considering the exceptions; any such allegation as to the construction or effect of the foreign law is a conclusion and involves a question of law for the court to determine on exceptions.

Although the District Court squarely met the issues raised on exceptions, as did the courts in *The Titanic* and other cases where the question of applicable limitation of liability law has been involved, the Court of Appeals below left the question undecided. It construed the petition "with as favorable an eye as possible" as if it had alleged as a fact that the Belgian law attached to the substantive right (R. 26). Such allegation of "fact", the court below said, "would be conclusive upon exceptions, since it would have been an allegation as to foreign law, which is treated as an allegation of fact" (R. 26). On this assumption, the court found it unnecessary to determine the specific exceptions of the respondents.

Exceptions are governed by Admiralty Rule 27. They are in the nature of a demurrer, or plea in bar, and may be taken as to the sufficiency, competency, or relevancy of a pleading. As a general rule, it is true, exceptions confess, for the purpose of testing a pleading, facts well pleaded; but they do not confess conclusions. 2 BENEDICT, ADMIRALTY (6th ed. 1940), p. 462.

Whether a limitation statute attaches as a matter of right or pertains to the remedy is, we submit, a

conclusion, and conclusions of law are, of course, for the court of the forum to determine.

An allegation as to the construction and meaning of foreign law is not admitted by demurrer. In *Finney* v. *Guy* (1903), 189 U. S. 335, the Court said:

> "The demurrer does not admit as a fact that the construction (in the form of an averment of fact) which the pleader may choose to put upon those statutes or decisions is the right conclusion to be drawn from them" (p. 344).

The pleader is bound to set out the substance, but it is for the court to judge whether it has the effect which he ascribes. *Coronet Phosphate Co.* v. *United States Shipping Co.* (S. D. N. Y. 1917), 260 F. 846; Note 134 A. L. R. 570, 572.

The Court of Appeals erred, we submit, in assuming that petitioners properly might have alleged that the Belgian limitation law attaches as a matter of "right". If such conclusions were treated as if they were properly pleaded facts, the whole purpose of exceptions would be defeated.

We submit that the court below did not err in affirming the order of the District Court. However, the order of dismissal should be allowed to rest upon the grounds adopted by the District Court. It is significant that in every modern case relating to the conflict of laws question here presented the courts have determined the issue on exceptions.[22]

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[22] The cases are cited *supra*, p. 9, n. 2.

V.

The petition was rightly dismissed as to both petitioners on respondents' exceptions challenging the sufficiency and competency of the allegations of the petitioners who sought to invoke an inapplicable foreign remedy; it was unnecessary for the court below to state affirmatively that no bond was required of the United States, since none was posted nor required, and the question as to the bond, raised by the Government for the first time in this Court, has no place in the debate.

In its petition for certiorari (p. 7), and in its brief herein (p. 41), the Government has assigned error to the court below for allegedly failing to hold that the United States was not required to post a bond, apart from the obligation of Black Diamond to do so.

We are surprised at such specification of alleged error. No exception was taken to the fact that the Government did not post a bond; it was conceded by all parties that there was no such requirement, nor did the courts below hold otherwise.

The petition for limitation of liability recites:

> "The petitioner United States of America, being a Corporation Sovereign, asks that no bond be required of it" (fol. 11).

In our brief below (on behalf of respondents herein) we stated (p. 2):

> "No bond or stipulation was filed by the petitioner United States of America and none is required of it in view of the provisions of the Suits

in Admiralty Act, 1920 (Title 46 U. S. C. Sec. 743)."

As a matter of fact, the interests of the United States of America, a nominal party in the instant proceeding, are extremely remote. This is in effect conceded by the petitioner, Black Diamond, in its brief (p. 32). The Court may well take judicial notice of the standard bareboat charter form the United States Maritime Commission pursuant to which the "Norwalk Victory" was demised to the Black Diamond Steamship Corporation (R. 2). Under the terms of that charter Black Diamond is the owner *pro hac vice;* the vessel is operated by Black Diamond's employees and covered by required insurance for protection of the interests of the United States.[23]

Government counsel did not even participate in the arguments below. The only reason the United States is a party at all is because the "Norwalk Victory" is Government owned, albeit Black Diamond, as the bareboat charterer, is the owner *pro hac vice.* But since legal title to the vessel is in the United States, no proceedings *in rem* may properly be instituted against her, nor may she be attached. The sole recourse of damage claimants to obtain the same benefits as would derive from an *in rem* proceeding is under the Suits in Admiralty Act, 1920 (46 U. S. C., 743), whereby the United States has waived its sovereign immunity and permits suits in admiralty under principles *in rem*, to be commenced in the District of the United States where the offending vessel may be found. Respondents have resorted to that statute here

[23] 46 *Code of Federal Regulations*, §299.82 (effective September 4, 1946).

to preserve such substantive rights as they may have under principles of *in rem* liability. But it would seem an unnecessary straining of technicalities to consider this case, as a practical matter, as anything but one involving Black Diamond, chargeable as the party primarily liable, and it was so treated, with counsels' concurrence, below.

Since Black Diamond is the party primarily charged with liability, and is not itself vested with sovereign immunity, the jurisdictional objections sustained by the District Court, so far as they are based upon inadequacy of the bond filed with the limitation petition, are, we submit, well founded. Apart from any question of bond, however, the further exceptions to the petition, based on grounds that the petition seeks on its face the benefits of a foreign remedial statute, are well taken as against both petitioners. In this respect the exceptions apply to the petitioner, United States of America, as well as to petitioner, Black Diamond. See 2 BENEDICT, ADMIRALTY (6th ed.), §333.

No question having been raised on the respondents' exceptions as to the conceded privilege of the United States not to put up a bond or other security, we submit that this error specified by the Government may safely be ignored so as to avoid a confusion of the actual issues.

VI.

If petitioners are in a dilemma regarding a *forum concursus* it is of their own making for submitting voluntarily to British jurisdiction on the one hand, and for failing to comply with the rules, statutes and precedents of the United States forum on the other.

Petitioners argue that the Court of Appeals has denied them a *forum concursus*. This is not exactly true. If petitioners had really desired a *forum concursus* in respect of all claims that might be asserted against them in the United States (and there have been none except in the single suit of cargo damage claimants in the Eastern District of New York), such *forum concursus* was available to them upon timely filing of a proper petition and a bond, of petitioner, Black Diamond, in the sum prescribed by the statutes and rules of the United States forum. It would have been the petitioner's privilege, thereafter, to move for a reduction of the bond if, after hearing on that issue, the court had felt that the Belgian statute applied. Respondents' exceptions (R. 12-13) did not challenge the right of petitioners' to file a proper petition for limitation of liability under United States laws, but contested the propriety of the foreign law allegations, and the sufficiency of Black Diamond's bond.

Petitioners took a voluntary risk when they filed a petition which they knew, or should have known, did not meet the statutory requirements of the forum, already held to be applicable to limitation proceedings by this Court in *The Titanic*, and by the precedents in the very same District Court, and in the Court of Appeals for the Second Circuit.[24]

[24] The cases are cited *supra*, p. 9, fn. 2.

Petitioners refer to a potential liability to the Belgian Government for damage caused by their vessel to the river bank, a liability, over which certainly the courts of the United States and respondents here have no control. Petitioner, Black Diamond, trading regularly to Belgium, can hardly escape the jurisdiction of a Belgian Court for that liability, if it exists. No injunctive process of United States courts could prevent it. Any such claim cannot be brought into concourse here.

As the Supreme Court said in *The Titanic*:

> "We see no absurdity in supposing that if the owner of the 'Titanic' were sued in different countries, each having a different rule affecting the remedy there, the local rule should be applied in each case. It can be imagined that, in consequence of such diverse proceedings, the owner might not be able to comply with the local requirements for limitation, as it also is conceivable that, if it sought the advantage of an alien law, it might as a condition have to pay more than its liability under the law of its flag in some cases. But the imagining of such possible difficulties is no sufficient reason for not applying the statute as it has been construed, on the whole, it would seem, with good effect" (233 U. S., at p. 734).

Petitioner, Black Diamond, also urges as an alleged inequity the fact that it has already posted bail of a million dollars in the High Court of Justice of England in the suit brought against it by the owners of the "Merganser". We are advised by our English solicitors that London solicitors for the "Norwalk Victory" agreed with solicitors for the "Merganser", almost immediately after the collision, to submit to

British jurisdiction as regards claims of the respective hull interests. Such seemingly voluntary and collusive submission to British jurisdiction is hardly cause for Black Diamond now to complain of the bond there posted, or to cite it as a justification for application of a foreign limitation of liability statute in an American forum.

We have adverted to the fact that if limitation of liability attached to the right, as petitioners here urge, the British bond, in any event, would not exceed $225,000, the approximate limitation amount in England and Belgium. The very admission that bail of $1,000,000 was posted in England by Black Diamond to meet the full claimed damages of the "Morgansor" under the applicable substantive law, subject to a later right to claim limitation, completely refutes petitioners' argument that limitation attaches to the right.

If petitioner, Black Diamond, had complied with requirements of the forum with regard to limitation of liability and had posted a bond in the United States in the amount of $1,000,000, it would not be in the dilemma it finds itself. It would have had a *forum conveniens* in the United States, so far as our courts are able to provide it. This dilemma has not been imposed on the petitioners by the court below; it is of the petitioners' own making.

Petitioner, Black Diamond, seems to feel aggrieved that cargo damage claimants have not resorted "to the courts of England, Holland and Belgium open to them" but rather have invoked the jurisdiction of the United States court in respect of damages caused by a vessel of the United States (brief of Black Diamond, p. 35). Damage claimants are of many nationalities. They are neither all English, Belgian, Dutch or American but some of each nationality and others beside

As we have pointed out, damage claimants have no recourse as of right against the "Norwalk Victory" or her sovereign owner, the United States of America, except in the District Court of the United States where the vessel may be found (46 U. S. C. 743).

Where the offending *res* is sovereign owned, as here, damage claimants might well be without adequate redress if their only recourse were a suit *in personam* against limited assets of a domestic corporate lessee in a foreign jurisdiction. In any event, there can be no inequity in holding the United States itself subject to the matters of policy enacted by the Congress, nor in similarly holding petitioner, Black Diamond, subject to the laws of its own country. If equities are to be considered, those in favor of innocent cargo owners and other injured third parties may not be ignored.

Conclusion.

It is respectfully submitted that on principle, precedents and public policy the order dismissing the petition on respondents' exceptions to the petitioners' foreign law allegations and the adequacy of Black Diamond's bond should be affirmed, for the reasons stated by the District Court.

Respectfully submitted.

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December, 1948.

APPENDIX.

1. United States Statutes:

The pertinent sections of the United States Code on limitation of shipowners' liability are as follows:

Title 46 U. S. Code §183:

"(a) The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

"(b) In the case of any seagoing vessel, if the amount of the owner's liability as limited under subsection (a) is insufficient to pay all losses in full, and the portion of such amount applicable to the payment of losses in respect of loss of life or bodily injury is less than $60 per ton of such vessel's tonnage, such portion shall be increased to an amount equal to $60 per ton, to be available only for the payment of losses in respect of loss of life or bodily injury. If such portion, so increased, is insufficient to pay such losses in full, they shall be paid therefrom in proportion to their respective amounts.

"(c) For the purposes of this section the tonnage of a seagoing steam or motor vessel shall be

her gross tonnage without deduction on account of engine room, and the tonnage of a seagoing sailing vessel shall be her registered tonnage. * * *"

"(d) The owner of any such seagoing vessel shall be liable in respect of loss of life or bodily injury arising on distinct occasions to the same extent as if no other loss of life or bodily injury had arisen.

"(e) In respect of loss of life or bodily injury, the privity or knowledge of the master of a seagoing vessel or of the superintendent or managing agent of the owner thereof, at or prior to the commencement of each voyage, shall be deemed conclusively the privity or knowledge of the owner of such vessel."

* * * * *

(Act March 3, 1851, 9 Stat. 635, as amended August 29, 1935, 49 Stat. 960, and June 5, 1936, 49 Stat. 1479.)

Title 46 U. S. Code §185:

"The vessel owner, within six months after a claimant shall have given to or filed with such owner written notice of claim, may petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of this chapter and the owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the interest of such owner in the vessel and freight, or approved security therefor, and in addition such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title, or (b) at his option shall transfer, for the benefit

of claimants, to a trustee to be appointed by the court his interest in the vessel and freight, together with such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title. Upon compliance with the requirements of this section all claims and proceedings against the owner with respect to the matter in question shall cease."

(Act March 3, 1851, 9 Stat. 635, as amended June 5, 1936, 49 Stat. 1480.)

2. Brussels Convention on Limitation of Liability, 1924:

The Convention has been adopted by Belgium and incorporated into its municipal statutes by Law of 28 November, 1928, effective 11 January, 1929, Code de Commerce, Livre II, Titre Ier, published in *Le Moniteur Belge*, 11 January, 1929. The English text of the Convention is in 6 Benedict, *Admiralty* (6th ed. 1941), pp. 88-91. Pertinent provisions are:

"Article 1. The liability of the owner of a seagoing vessel is limited to an amount equal to the value of the vessel, the freight, and the accessories of the vessel, in respect of—

1. Compensation due to third parties by reason of damage caused, whether on land or on water, by the acts or faults of the master, crew, pilot, or any other person in the service of the vessel;

* * * *

Provided that, as regards the cases mentioned in Nos. 1, 2, 3, 4, and 5 the liability referred to in the preceding provisions shall not exceed an aggregate sum equal to 8 pounds sterling per (net) ton of the vessel's tonnage.

Article 2. The limitation of liability laid down in the foregoing Article does not apply

(1) To obligations arising out of acts or faults of the owner of the vessel;

* * *

Article 5. * * *

Payments on policies of insurance, as well as bounties, subventions and other national subsidies, are not deemed to be accessories.

* * * * *

Article 12. The provisions of this Convention shall be applied in each Contracting State in cases in which one of the parties interested is a national of another Contracting State, as well as in any other cases provided for by the national laws.

Nevertheless the principle formulated in the preceding paragraph does not affect the right of the Contracting States not to apply the provisions of this Convention in favor of the nationals of a non-Contracting State.

* * * *

Article 15. * * *

Those Contracting States in which the pound sterling is not the monetary unit reserve to themselves the right of translating the sums indicated in this Convention in terms of pounds sterling into terms of their own monetary system in round figures." (See Table, 3 Benedict, *Admiralty* (6th ed.), p. 643.)